TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 482.

THE UNITED STATES, APPELLANT,

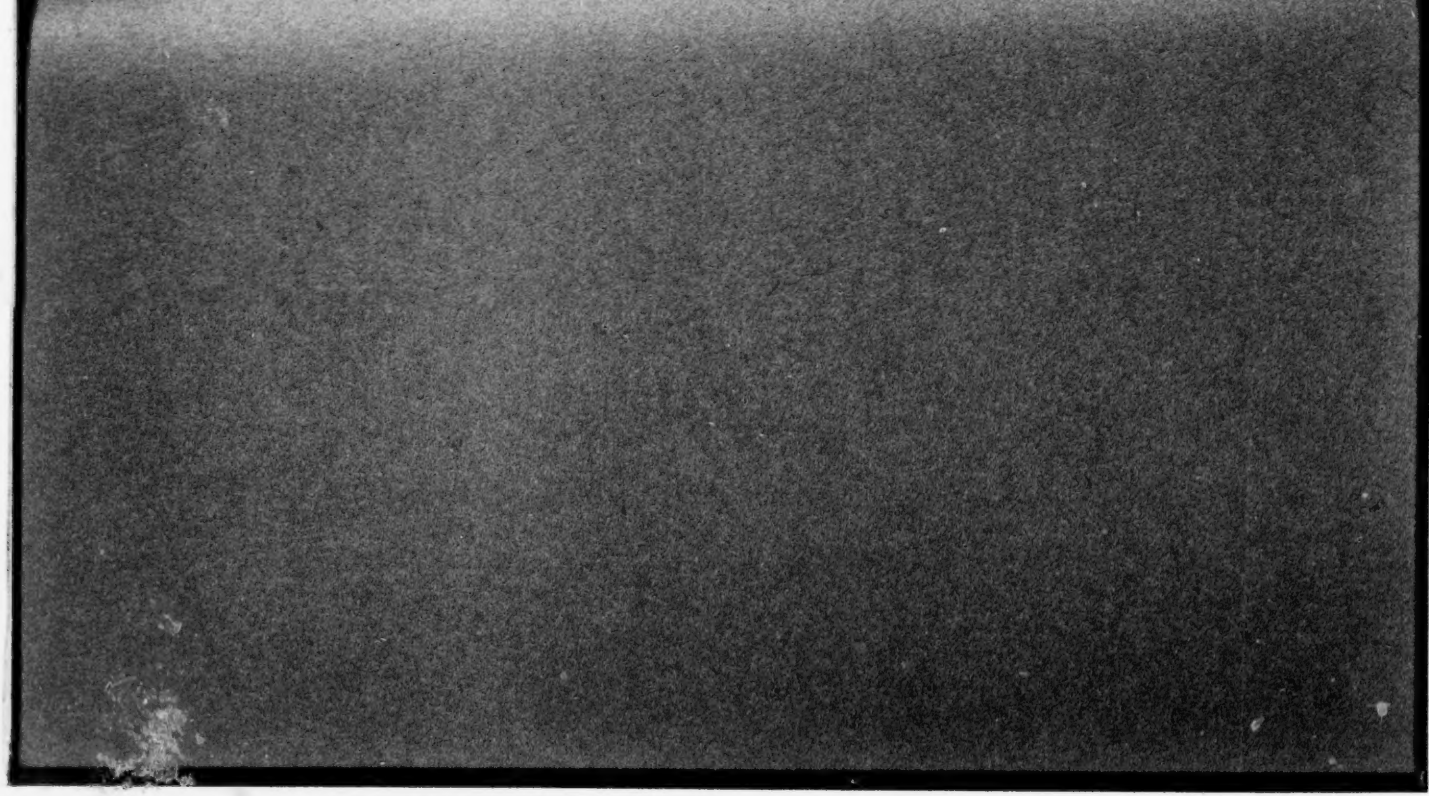
vs.

EDWIN M. KEATLEY.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 2, 1906.

(20447.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 482.

THE UNITED STATES, APPELLANT,

vs.

EDWIN M. KEATLEY.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims.

EDWIN M. KEATLEY
v.
THE UNITED STATES. } No. 24725.

I.—PETITION AND EXHIBITS.—*Filed January 29, 1904.*

To the honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner, Edwin M. Keatley, a citizen of the United States residing at Charleston, in the State of West Virginia, respectfully represents:

I.

That from January 1st, 1901, to January 1st, 1904, he was the clerk of the United States Circuit and District Courts for the Southern District of West Virginia, duly appointed, qualified and acting.

II.

That during said period he performed services as such clerk for and in behalf of the United States, and his accounts for fees thus earned were verified by his oath and presented to the court for approval, and the same were approved in the manner required by the act of February 22, 1875, and final action was taken on said accounts by the accounting officers of the Treasury Department and part thereof was allowed and part was disallowed aggregating $170.00, as more specifically set out in Exhibit A.

2 III.

Petitioner is the sole owner of this claim; no assignment or transfer of the claim or any part thereof, or any interest therein has been made; the petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and set-offs, and the petitioner believes the facts as stated in this petition to be true.

Wherefore the petitioner prays judgment against the United States in the sum of $170.00.

EDWIN M. KEATLEY,
By F. B. CROSTHWAITE,
His Attorney.

DISTRICT OF COLUMBIA, *ss:*

Before me, Edward F. Colladay, a commissioner of the Court of Claims, personally appeared Frank B. Crosthwaite, who, being duly sworn, says that he is the attorney for the petitioner named in the foregoing petition, and that he has read the same and the facts therein stated are true to the best of his knowledge and belief.

In witness whereof I have hereunto set my hand and official seal this 28th day of January, A. D. 1904.

[OFFICIAL SEAL.]

E. F. COLLADAY,
Comr. Court of Claims.

EXHIBIT A.

The United States to Edwin M. Keatley, Dr.

To services performed as clerk of the U. S. Courts for the Southern District of West Virginia from July 1, 1901, to January 1, 1904, as follows:

Item 1.

A. Report 78594, item 3.

For oaths to U. S. marshals as to correctness of accounts, 18 at 10 cents 1.80

B. Report 82292, item 1.

Oaths and jurats to accounts of office deputy marshal, 2 at 25 cents ..... .50

Item 2.

Report 78594, item 6.

For filing 20 exhibits with bill and one exhibit with report 21 at 10 cents 2.10

Item 3.

A. Report 85736, item 2.

For services performed and rendered in a supplemental account 86.50

B. Report 85736, item 5.

For filing affidavits of poor defendants for process to issue to witnesses 4 to 10¢ ..... .40

Item 4.

A. Report 95379, item 1.

For issuing subpœna, duces tecum in excess of 25 cents, 2 at 75 cents 1.50

B. Report 98091.

Same as item A of item 4, 1 to 75¢ ..... .75

C. Report 95379, item 2.

For issuing more than one subpœna for the same witnesses to testify in several cases, 29 at 25 cents 7.25

Report 98091, ditto, 17 at 25¢ 4.25

Report 98092, ditto, 1 at 25¢ ..... .25

D. For issuing 5 subpœnas and entering return and filing same in excess of one for each witness, 5 at 50 cents 2.50

Item 5.

A. Report 95379, item 3.

For making copies of subpœnas for witnesses whose names appear in other subpœnas, 154 at 20 cents 30.80

Report 98091, ditto, 17 to 25¢ 4.25

Report 98092, ditto, 1 at 25¢ ..... .25

Item 6.

Appeal number 9738. For separate docket fees in separate trials under one indictment 16.00

Total of Exhibit A $170.00

5 II.—TRAVERSE.—*Filed March 12, 1906.*

In the Court of Claims of the United States, December term, A. D. 1905.

EDWIN M. KEATLEY
vs.
THE UNITED STATES. } No. 24725.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney-General.

6 III.—COUNTER-CLAIM.—*Filed January 17, 1905.*

Now comes the Attorney-General, by the Assistant Attorney-General, and, further answering the petition in this case, says that said Edwin M. Keatley is indebted to the United States in the sum of fifty-seven dollars and ninety cents ($57.90), for this, that in certain accounts for services heretofore rendered by said Edwin M. Keatley as clerk of the U. S. Circuit and District Courts charges were made for "docketing judgments" as follows:

Fees for docketing judgments.

Allowed by certificate No.	Fiscal year.	Court.	Amount.	
88044	1903	District	$3.00	
90179	1903	do	8.70	
92228	1903	do	.60	
95379	1903	do	7.80	
96733	1904	do	5.25	
100316	1904	do	3.30	
102810	1904	do	7.50	
105477	1905	do	3.75	
				$39.90
80297	1902	Circuit	3.75	
85736	1902	do	6.00	
89043	1903	do	2.85	
98847	1903	do	.15	
92915	1903	do	.45	
95382	1903	do	.75	
100318	1904	do	3.60	
102809	1904	do	.45	
				18.00
				57.90

Said charges were afterwards erroneously and without au-
7 thority of law paid to said claimant, and claimant withholds repayment thereof to the defendant.

Wherefore, the defendant says that it ought to have and recover from said claimant the sum of $57.90 so wrongfully and erroneously charged and paid as aforesaid, and prays judgment against the claimant for the same, or if the claimant shall establish his claim in this case for any sum in excess of said amount, that the same be held as a valid claim or set-off against the amount so established.

(Signed) L. A. PEADT,
Assistant Attorney-General.
PHILIP M. ASHFORD,
Special Attorney.

8 IV.—CLAIMANT'S REPLICATION.—*Filed February 10, 1905.*

Item 1 of Finding III:

Subitems A and B. For administering oaths to United States marshal as to the correctness of his accounts for money disbursed by him.

It is contended that where an officer is required by law to perform certain duties the necessary expenses incurred by him in the performance of such duty are chargeable against the United States, and he should not be required to pay the same. The claimant in this case administered an oath for each account and charged 10 cents each.

The claimant also administered oaths to office deputy marshals as to the correctness of expense accounts and charged 10 cents for each oath.

The same theory which governed the decision in the cases of Elton v. U. S., Number 20982; Jas. P. Luse, 20983; Phillips, 20984; Shelley, 20985, and a number of other similar cases can be applied to this case.

In the cases cited above the claimants were registers and receivers
9 of United States land offices, and as such officers expended money for rent of land offices and presented their accounts to the Interior Department, and the items were disallowed, and the claimants brought suit in this court for said items, and judgment was rendered in their favor against the United States.

Item 2 of finding III:

For filing 21 exhibits at 10 cents each.

Counsel for the defense objects to this item on the theory that the service was unnecessary.

The claimant testifies that the exhibits were filed separately, each being indorsed and formally filed by the clerk, which was in conformity to the practice of the court.

Item 3 of finding III:

The only objection raised by counsel for the defense is that the allowance of the item would give to the claimant an excess of his compensation.

The question involved in this item and for this court to determine, is whether or not fees of this character are allowable and chargeable against the United States. If the court desires to adjust the account, proper data will be furnished showing the exact amount for which judgment should be given.

If the court is not disposed to adjust the account, then judgment should be given for such items as are allowable and let the accounting officers of the Treasury Department pay to this claimant such amount as can be paid under said judgment without going in excess of the maximum compensation allowable by law.

10 Subitem B, of item 3 is a charge for filing affidavits to which no objection is made by counsel for the defendants.

Item 4 of finding III:

Subitems A and B: Charges for issuing 3 subpœna duces tecum.

The claimant charged $1.00 for each of the three writs, on the theory that they are a writ within the meaning of clause 1 of section 828 of the Revised Statutes. The Department allowed 25 cents for each, on the theory that they are simply subpœnas, and this item is for the recovery of 75 cents which was disallowed for each writ.

Subitem C: This charge is for issuing 47 subpœnas at 25 cents.

The Department disallowed the charges for more than one subpœna for the same person to appear and testify in different cases at the same term of court. Separate subpœnas were issued by direction of the court in conformity with the long practice of the District Court of West Virginia. (Claimant's deposition, pages 4 and 5.) These subpœnas were issued by direction of the court and the Supreme Court of the United States (193 U. S., 528) says:

"An order of the court requiring a service to be performed is sufficient authority as between the clerk and the Government for the performance of the service and the allowance of the proper fee therefor."

11 In disposing of this item, the court's attention is respectfully invited to the decision of this court in the case of H. B. Armistead v. The United States, Number 23284.

Subitem D: This is for issuing 5 subpœnas at 25 cents each, and entering return and filing the same at 25 cents each.

The remarks made in the foregoing item will apply to this subitem.

Item 5 of finding III:

Subitem A: For making copies of subpœnas for witnesses.

The copies were furnished in pursuance of an order of court which embodies the requirements of the local statutes that service of all process shall be by delivering a copy thereof to the party to be served. A full copy of the order of court is set out in the claimant's request for findings of fact. (See Jones v. U. S., 193 U. S., 528.)

Item 6 of finding III:

This is a charge for making dockets, indexes, etc., arising in cases where more than one defendant was indicted, and, upon motion, the court granted a severance giving to each defendant a separate trial.

The cases were separately designated on the docket, and separate docket entries were made under each designation. Only one docket fee was allowed for all of the cases.

The case was just as much a separate trial, and the United States is just as properly chargeable with the docket fee in each case
12 as if the defendants had been indicted separately. The charges herein made were allowed by the Auditor, but the Comptroller, upon revision of the account at the suggestion of the Attorney-General, decided in favor of the Government, in order that—

"The question might be determined in court, where the Attorney-General may present his views and have the question properly decided and settled."

Respectfully submitted.

F. B. CROSTHWAITE,
Claimant's Attorney.

13 V.—FINDINGS OF FACT AND CONCLUSION OF LAW.—*Filed May 7, 1906.*

EDWIN M. KEATLEY
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant, Edwin M. Keatley, was clerk of the United States Circuit Court for the Southern District of West Virginia from July 1, 1901, to July 16, 1902, and was clerk of both the Circuit and District Courts for the said district from July 16, 1902, to September 17, 1904.

II.

Claimant's accounts for fees earned during the period from July 1, 1901, to January 1, 1904, duly verified, were presented to and approved by the United States court in the manner prescribed by the act of February 22, 1875. Said accounts were presented to the accounting officers of the Treasury for payment. The items embraced in Finding III were included in said accounts and were disallowed by the accounting officers after explanations of same had been made to them by the claimant.

III.

Item 1. (A) Administering oath to United States marshal as to correctness of his accounts for disbursements, 18 at 10 cents each, $1.80.

(B) Administering oaths to two separate accounts of office deputy marshal, 10 cents each, and attaching jurat thereto, 15 cents each, 50 cents.

Item 2. Filing 21 exhibits in a case at 10 cents each, $2.10.

The exhibits were filed separately, each being indorsed, marked, and formally filed by the clerk.

Item 3. (A) Attendance on court, nine days between August 31, 1901, and January 1, 1902, at $5 each, $45.

(B) Attendance on court, seven days between January 1 and April 1, 1902, at $5 each, $35.

(C) Entering nine orders opening court and nine orders closing court, at 15 cents each (prior to January 1, 1902), $2.70.

(D) Entering seven orders opening court and seven orders closing court, at 15 cents each (January 1 to April 1, 1902), $2.10.

The orders were received by claimant from the judge indorsed "enter," or "enter this order," and signed by the court, whereupon claimant entered the orders, and the court afterwards signed the records for each date. Claimant was paid within $15.15 of his maximum for his services in 1902, so that of items B and D (1902) there is left but said sum of $15.15.

(E) Filing four affidavits for poor defendants for process for witnesses, at 10 cents each, 40 cents.

Item 4. (A and B) Issuing three subpœnas duces tecum, at 75 cents each, $2.25.

Claimant charged $1 for each of the three writs and the Department allowed him 25 cents each.

(C) Issuing forty-seven subpœnas at 25 cents each, $11.75.

The accounting officers disallowed all charges for more than one subpœna for the same person to appear and testify in different cases at the same term of court.

(D) Issuing five subpœnas at 25 cents each, and entering return and filing same at 25 cents each, $2.50.

This is similar to the preceding item.

Item 5. (A) Making copies of subpœnas for witnesses whose names appear in other subpœnas, 231 at 20 cents each, $46.20.

These copies were furnished in pursuance of the following order of court:

"The statutes of West Virginia require that service of all process shall be made by delivering a copy thereof to the party to be served, and it appearing that some confusion has occurred from the practice of the marshal of this district serving subpœnas on witnesses by reading the same to them and failing to give copies thereof to said witnesses, it is here ordered that the clerk of this court do in future furnish the marshal of this district with a copy of each and every subpœna issued by him in criminal cases, to be left with witnesses as is required by the laws of the State of West Virginia, and that his fees therefor be allowed by the court and certified to the proper accounting officer of the Treasury for settlement.

14 Item 6. Separate docket fees for separate trials under one indictment, seven at $1 each where no issue joined and three at $3 each where issue joined and testimony taken—$16.

The above was in cases where an indictment was returned against two or more defendants and motion for severance on behalf of defendants was granted by the court allowing separate trials, and each defendant was separately designated on the criminal docket. The charges were allowed by the Auditor, but, upon revision, were disallowed by the Comptroller in order that the question might be determined in court. A separate jury was called in each case where a trial was had, and the claimant performed the identical services in each case.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States in the sum of one hundred and twenty-five dollars and forty-five cents ($125.45) on subitems A and C of item 3; $15.15 of subitems B and D of item 3; subitem E of item 3, and items 5 and 6.

All other items are disallowed.

The defendants' counterclaim is overruled.

BY THE COURT.

VI.—OPINION OF THE COURT.—*Filed May 7, 1906.*

BOOTH, J., delivered the opinion of the court:

This case is now before us on claimant's motion to amend the findings heretofore filed, and defendants' cross motion for a new trial.

As disclosed by the findings of this court, filed February 27, 1905, claim was originally presented on behalf of Edwin M. Keatley, clerk of the United States circuit and district courts for the southern district of West Virginia, for fees earned during the period stated therein. Judgment was awarded the claimant for $79.25. The item contested in this motion by claimant is item 5; that contested by defendants is item 6, and the overruling of their counterclaim.

Item 5 is a charge for making copies of subpœnas for witnesses whose names appear in other subpœnas. The statutes of West Virginia require that service of process shall be made by copy. The Federal court required by order that all its subpœnas should be served by copy as required by said State law, and it was in pursuance of said order that this service was performed. We think the item allowable under the authority of United States *v.* Jones (193 U. S., 528).

The defendants' contention as to item 6 is troublesome. It appears that joint indictments were returned against several defendants; that on motion of defendants' counsel separate trials were granted to some of the defendants, whereupon the clerk made separate docket

entries in accordance with said motion, docketing said causes the same as though separate indictments had been returned against the parties granted separate trials.

Paragraph 10 of section 828 of the Revised Statutes provides:

"For making dockets and indexes, issuing venire, tax costs, and all other services on the trial or argument of a cause where issue is joined and testimony given, three dollars."

By paragraph 11 a fee of $2 is allowed where no testimony is given, and by paragraph 12 a fee of $1 is allowed where the cause is dismissed or discontinued or judgment or decree rendered without issue.

Defendants' contention rests upon the legal signification to be attached to the word "cause," insisting that the trial court, by granting a severance of the one case, did not thereby create several distinct causes, and that the statute embraces an allowance for the one cause only. The terms "case," "suit," and "cause" are used synonymously in statutes and judicial decisions, each term indicating a proceeding in court. The intention of the legislature in employing the term must be ascertained by reference to the context of the whole act. No positive rule affixing their technical meaning under all circumstances can be prescribed. The Congress in the above statute, by enumerating the details of a trial, such as issuing a venire, taxing costs where issue is joined or testimony given, evidently employed the term "cause" as usually used in practice before courts. It is difficult to perceive otherwise.

In the case at bar separate and distinct proceedings were had as to the severance granted the defendants; separate and distinct docket entries must necessarily have been made as to the disposition of the separate proceedings, and for this service, indispensable in its nature, we believe the Congress intended to allow fees.

The defendants' counterclaim, predicated upon the alleged illegal allowance for the docketing of judgments, will have to be dismissed. The services here charged for were admittedly performed by order of the court, and under the Jones case (supra) allowable.

Claimant's motion to amend findings will be allowed. Findings of fact and conclusion of law heretofore filed withdrawn and judgment set aside, and new findings filed as of this date awarding judgment in favor of the claimant for $125.45.

15 VII.—JUDGMENT OF THE COURT.

EDWIN M. KEATLEY
v.
UNITED STATES. } No. 24725.

At the Court of Claims held at the city of Washington, on the 7th day of May, 1906, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Edwin

M. Keatley, do have and recover of and from the United States the sum of one hundred and twenty-five dollars and forty-five cents ($125.\frac{45}{100}$.)

BY THE COURT.

16 VIII.—APPLICATION FOR, AND ALLOWANCE OF, APPEAL.

In the Court of Claims of the United States, Dec. term, 1905–6.

EDWIN M. KEATLEY
vs.
THE UNITED STATES. } No. 24725.

From the judgment rendered in the above-entitled cause on the 7th day of May, 1906, in favor of claimant, the defendants, by their Attorney-General on the 18th day of June, 1906, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
Assistant Attorney-General.

Filed June 18, 1906.

October 22, 1906. Ordered that the foregoing appeal be allowed as prayed for.

BY THE COURT.

17 Court of Claims.

EDWIN M. KEATLEY
vs.
THE UNITED STATES } No. 24725.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, of the opinion of the court, of the final judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 31st day of October, A. D. 1906.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 20447, Court of Claims. Term No. 482. The United States, appellant, vs. Edwin M. Keatley. Filed November 2d, 1906. File No. 20447.

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CLERK.

No. 482.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
EDWIN M. KEATLEY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

J. A. VAN ORSDEL,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
EDWIN M. KEATLEY. } No. 482.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Edwin M. Keatley, the appellee, was clerk of the United States District and Circuit Courts for the Southern District of West Virginia during the period from January 1, 1901, to January 1, 1904. He regularly rendered accounts against the United States for services performed during said period as such clerk, which contained, among other things, charges for "separate docket fees in separate trials under one indictment." Said charges were disallowed by the accounting officers, and suit was brought therefor in the Court of Claims. (Item 6 of the petition, bottom of page 2, Record.)

The circumstances under which these services were performed are shown in the last paragraph of the third finding of fact. (Rec., p. 8.) Judgment was rendered for claimant on said item.

A counterclaim was filed in the Court of Claims, praying for the recovery of $57.90 charged for "docketing judgments" and alleged to have been erroneously and unlawfully paid to the claimant by the defendant's accounting officers. What purports to be a replication to said counterclaim was filed in the Court of Claims (Rec., pp. 4–6), but an examination thereof discloses the fact that the counterclaim is not referred to therein. The court made no finding with respect to the counterclaim, but it is stated in the opinion that the services charged for, "docketing judgments," were admittedly performed by order of the court (Rec., p. 9).

This fact is not disputed, and appellant is willing that it may be treated as if stated in the findings of fact.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

(1) In rendering judgment against the appellant for the charges included in item 6, finding 3. (Rec., p. 8.)

(2) In overruling appellant's counterclaim. (Rec., p. 3.)

ARGUMENT.

The services charged for under item 6 were performed in cases where an indictment was returned against two or more defendants and motion for sever-

ance on behalf of defendants was granted by the court allowing separate trial, and each defendant was separately designated on the criminal docket and entries made thereunder precisely as if such defendant had been separately indicted. The amount involved in this case is only $16. The legal questions involved, however, touch every clerk of a Federal court. The decision of this court will determine the payment or nonpayment of many thousands of dollars annually to them for such services as are claimed for in this item.

The clerk's fee bill, so called, provides:

> For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars.
>
> For making dockets and indexes, taxing costs, and all other services in a cause where issue is joined but no testimony is given, two dollars.
>
> For making dockets and indexes, taxing costs, and other services in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar. (Sec. 828, paragraphs 10, 11, and 12.)

As suggested in the opinion of the Court of Claims, the issue as to this item turns upon the signification to be attached to the word "cause" as it occurs in the paragraphs in the statute above quoted. It is the contention of the United States that the word "cause" as here used is limited to the "true bill" or indict-

ment returned by the grand jury. That is to say, if the indictment was returned against A, B, and C, the "cause" which the clerk of the court would docket under such indictment would be "*The United States* v. *A, B, and C,*" and the fee prescribed in the paragraphs of the statute above quoted would be payable to the clerk upon the *final* disposition of said "cause."

It was not within the province of the trial court to make more than one "cause" by granting separate trials to the individuals thus jointly indicted. It, of course, had the right to grant separate trials, and the doing so may have entailed upon the clerk some additional work in the way of making entries in his dockets, but there is no argument in this in favor of his claim for compensation for extra service.

This court has held, in the case of *United States* v. *McCandless* (147 U. S., 692), that a docket fee is not taxable until the case is finally disposed of. That was a case in which the jury disagreed or in which there was a mistrial for some reason, and the case was continued. It is pertinent here to inquire what other or greater hardship in the way of performing extra service was laid upon the clerk in the case at bar, where *separate* trials were granted, than in the case of McCandless, who was compelled to empanel a jury, tax the costs, and perform all other service a second time, and so on, until the case was "finally disposed of," before he was entitled to receive his docket fee.

It was not necessary that the clerk in this case should separately designate on the docket, under a separate docket number, the defendants jointly indicted and separately tried. The entries made under such caption were manifestly the same as if they had been entered under the original caption as designated in docketing the indictment. But if the clerk chose, for the purposes of his own convenience, to give each separate trial an individual docket number, he can not be criticised for so doing. It seems perfectly clear that such action on his part, even though he may have been specifically directed by the court so to do, which does not appear, would not operate to increase or multiply the fees of his office by thus arbitrarily separating a "cause" into causes.

If the clerk in the case at bar had a right to make an additional "case" or "cause" by separately designating each defendant separately tried and giving the trial proceedings a separate docket number, then there was no reason why Clerk McCandless could not have made a separate case or "cause" by redocketing and giving a new docket number to the case in his court when it came up for a new trial. The second trial of the case in Clerk McCandless's court was as much a "proceeding in court," as suggested in the opinion of the Court of Claims, as was the separate trial of the second defendant named in a joint indictment in the case at bar.

ASSIGNMENT OF ERROR, NO. 2.

Docketing judgments, it is contended, is a service which is covered by the docket fees prescribed in the

paragraphs of section 828 quoted above. Many definitions of the word "docket" are given in the law dictionaries, encyclopedias of law, and other standard works. They all agree that a docket is a book containing a brief summary or digest of the proceedings of the court with relation to specific matters. Thus we speak of the trial docket, the judgment docket, the execution docket, mechanics' lien docket, etc.

The findings of this court on the subject of this counterclaim are not as full and complete as they might be, but it is believed that it appears from the face of the counterclaim itself that the fees claimed for "docketing judgments" are detail fees such as folio fees for each entry made in said docket. At all events, it is perfectly apparent from the statement of the allowance of said fees (Rec., p. 3) that the charges were not those specified in paragraphs 10, 11, and 12 of section 828.

It will be observed that the language of that statute does not confine the fee prescribed to any one docket or kind of docket, but it is plural in number and unlimited as to kinds. Had Congress intended it to apply to but one book, as, for example, the appearance docket, or the execution docket, or the criminal docket, it would have so stated, or at least it would have used the singular—"making *the* docket." The fee thus provided is a case fee covering all the "services" of the character defined in *a* "cause," and not *in causes*, hence it can not be contended that the term is pluralized because of its application to two or more

causes. It was clearly made plural because of the various dockets which may be required in *one* cause. As was well said by the Circuit Court of Appeals for the Fifth Circuit, in a recent decision:

> These docket fees seem to provide for making dockets and taxing costs in every class of cases likely to arise in the courts of the United States. The fee bill does not specify the dockets to be kept, but seems to include all services in keeping dockets. (*United States* v. *Marsh*, 112 Fed. Rep., 929.)

It is therefore submitted that services performed by the clerk in "docketing judgments" can only be compensated by the docket fee of one, two, or three dollars, as the case may be. If this contention is correct, it follows that the payment made to appellee of the fees indicated in the counterclaim was erroneous and unlawful, and the United States has a right to recover the same.

The Court of Claims puts its disallowance of the counterclaim on the ground that the services were required to be performed by an order of the court, and cites in support of its conclusion the decision of this court in the case of *Jones*. (193 U.S., 528–530.) What the court said in that case was that, as between the clerk and the Government, an order of the court requiring a certain service to be performed was sufficient authority for the performance of the service and the allowance of the *proper fee* therefor. The question in the case at bar is what is the proper fee. There is no question at all but that Clerk

Keatley was required to keep a judgment docket and make the necessary entries therein, and if there is any fee in any statute prescribed for making entries in a judgment docket, or for "docketing judgments," he is certainly entitled to be compensated in accordance therewith. But we have failed to find any such fee, except so far as paragraphs 10, 11, and 12 of section 828 prescribe such compensation.

It will no doubt be contended by counsel for appellee that such a fee is prescribed by paragraph 8 of said section. If it is, it must come under the provision "for entering any * * * judgment * * * or making any record." As has been before pointed out, a judgment docket is not a record in the sense that it contains an entry of the judgment *in extenso*. Entering a brief note of the fact that a judgment had been entered such as would naturally be made in a judgment docket would not be "entering" a judgment, nor would it be making a record of the judgment.

It is therefore respectfully submitted that the Court of Claims erred: (1) In allowing docket fees where there was a separate trial for defendants jointly indicted; (2) In overruling the counterclaim filed by the appellant.

J. A. VAN ORSDEL,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Assistant Attorney.

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Office Supreme Court, U. S.
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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 482.

THE UNITED STATES, APPELLANT

vs.

EDWIN M. KEATLEY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR EDWIN M. KEATLEY.

FRANK B. CROSTHWAITE,
Counsel for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1906

THE UNITED STATES,
APPELLANT

vs.

EDWIN M. KEATLEY,
APPELLEE.

Docket No. 482

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR EDWIN M. KEATLEY.

The case is fairly stated in brief of counsel for appellant. The appellee was clerk of the United States Court for the Southern District of West Virginia.

An indictment by the grand jury in that District included several defendants. On motion by counsel for the defendants the court granted a severance for each defendant and each defendant was separately designated on the docket and a separate jury was empanelled and costs were taxed separately, and the clerk charged in his accounts for fees earned, the proper docket fee in each of said separate cases.

The accounting officers allowed one docket fee for all of the cases and disallowed all the other charges on the theory that because all the defendants had been indicted in *one* indictment there was only *one* "cause," hence only one docket fee should be charged for all of the entries made in all of the cases.

The clerk brought suit in the Court of Claims to have the legality of the charge judicially determined. The court decided in effect that the action of the court in granting a separate trial for each defendant created a separate cause and that the charge of a docket fee in each case was lawful. From that decision appeal was taken to this court.

Counsel for appellant contends that the word "cause" as used in the fee bill is a technical term and its significance should be restricted to the "indictment" returned by the grand jury, and an indictment so returned, forms the basis for the charge of a docket fee in any "cause" even though several different persons were included therein.

It is admitted that only one docket fee is chargeable where there is only one trial but in the case at bar the court granted a separate trial for each defendant and a separate designation on the docket was given to each defendant and entries made on the docket of all the proceedings in each case in court respectively.

For the purpose of determining what fees shall be charged by a clerk of a court for any specific service performed it is contended by the appellee that the word "cause," as used in the fee bill, and applicable to this case, should be given a broader and more liberal construction than that given by the appellant. In other words it is contended that the word "cause" as applied to this case was intended to cover the entire proceedings in a case including the trial from beginning to the end.

The three clauses in the fee bill (Paragraphs 10, 11 and 12, Section 828, R. S.) providing for docket fees, furnishes a graduated fee of three dollars, two dollars and one dollar respectively, according to the amount of work done in keeping the dockets and indexes in a cause. It would therefore seem that it is intended that the clerk of the court who is working under a system of fees is to be paid according to the amount of labor performed.

Counsel for the appellant thinks not, but on the contrary that he should have only one docket fee not to exceed three dollars even though a hundred persons had been jointly indicted, each of whom, being separately tried by order of the court, and separate docket pages kept for each defendant under a separate designation or caption. Such a theory would consume almost the clerk's entire time without any compensation in excess of the three dollars.

This item depends entirely upon the legal significance of the word "cause" in the law cited, supra.

Counsel for the appellant contends that the indictment is the "cause." Not so, however. The indictment is merely the means or vehicle by which the defendant is made acquainted with the offense with which he is charged. There may be a "cause" where no further proceedings are had than the indictment, but it is still a "cause" during trial including judgment and the sentence. That is what constitutes a "cause."

It is believed that the law providing fees for keeping dockets was intended to be construed so as to give such a fee to the clerk as would reasonably compensate him for services for making docket entries, indexes, etc , for each case tried in court.

The reasons given by the Court of Claims (Record, page 9) to the effect that if there was a separate trial ordered by

the court for each defendant there was a separate "cause" and the clerk is entitled to a separate docket fee for each cause or trial, appear to be sound and just and upon that construction of the law the appellee rests his case.

There appears to be no dispute as to the facts in this case. Several persons were indicted under one indictment and upon motion by counsel for defendants for severance, the court granted a separate trial for each defendant.

The fact that the court granted the motion upon proper grounds shown into court, is not disputed. The appellee separately designated each defendant on the docket and necessarily entered under each separate designation or caption all of the proceedings in each case respectively.

Counsel for the appellant makes the following statement in his brief :

> "It was not within the province of the trial court to make more than one cause by granting separate trials to the individuals thus jointly indicted."

That statement raises the issue in this case and an answer to the following questions might determine the matter.

Did the court, by granting a severance for each defendant, create a separate cause, having in view the right of the appellee to charge a separate docket fee for making entries on the docket in each of the said separate cases respectively?

The following authorities are directly in point :

After severance the records in the several cases become entirely distinct and to all intents and purposes as though the defendants were charged in separate indictments.

State v. Rogers, 6 Baxt. (Tenn.) 563.
Noland v. State, 19 Ohio 131.

Where an order of severance is made it is equivalent to dividing the cause into a number of distinct actions.

Bryan v. Spivey, 106 N. Car. 99.

Where severance is had one defendant cannot rely upon anything in the record of the trial of another defendant as *Res Adjudicata* in his own case.

Eikenberry v. Edwards, 71 Iowa, 82.

Where severance is granted separate judgments become necessary. It appears, therefore, that the granting of a severance does constitute separate causes or cases and if it shall be so decided then the appellee is entitled to his separate fee for keeping separate dockets and indexes in each of the several cases thus created and that the Court below was not in error.

The second error assigned by appellant appears to be based upon the theory that no matter what is entered in a book which may bear the mark or label "docket" the entry therein must necessarily be a "docket entry" and is covered by the docket fee of one, two and three dollars for "keeping dockets, indexes, etc."

In the case at bar on which appeal is taken, the appellee entered all of the material features of the judgments of the court in criminal cases in compliance with the rule of court, which reads as follows:

> "The clerk of this court is directed to keep a judgment docket wherein shall be *recorded* abstracts of all judgments rendered in cases wherein the United States is a party. Said Judgment Docket shall contain:
> The number of the case.
> The date of the indictment.
> The names of the parties.

The amount of the judgment.
The amount of costs.
The date of the judgment.
When docketed.
The amount paid.
The disposition of the funds and any additional matter, which the clerk may deem pertinent."

For such services the appellee made a charge of fifteen cents per folio "for making a record" as provided by Section 828 R. S., and the charges were allowed by the Auditor and paid, and at a later time the Attorney General asked the Comptroller of the Treasury to revise said accounts on the theory that such charges were "docket entries" and were covered by the fee for "keeping dockets, indexes, etc."

The Comptroller's decision of January 26, 1904, holds that the entries constituted the making of a permanent record and that the charges were lawful.

Subsequently the clerk instituted a suit in the Court of Claims for other fees which had been disallowed by the accounting officers and in defending said suit the charges involved in this particular item were set up by counsel for the United States as a counter claim and the Court of Claims overruled the counter claim, from which action this appeal is taken.

Counsel for appellant again places a restricted construction on the law providing fees for services of clerks of court. The law, Section 828, provides fees of three dollars, two dollars and one dollar for "keeping dockets and indexes."

In all United States courts there are several different dockets and indexes kept. For instances, the "trial docket," the "criminal docket" the "civil docket."

There are also "execution docket," the "writ docket" and the "process docket."

The entries made in the dockets which are covered by the docket fee, are the entries of fact under each case or caption, that a certain proceeding was had, as for example the entry in a case docketed in a criminal docket, following the caption or designation of the case, would be:

Warrant of arrest issued.
Subpoena issued for A, B, etc.
Warrant returned and filed.
Subpoenas returned and filed.
Verdict guilty filed.
Judgment and sentence entered.

Such are the class of entries which would be covered by docket fee.

The entries made which are the subject matter of this item were not such entries of fact. They were entries which constituted a permanent record.

The very fact that the rule of court cited, supra, directs that the judgment shall be "*recorded*" shows conclusively that the entries constitute the making of a record.

Counsel takes the technical ground that because the entries of all the material features of a judgment as recited in detail above, were made in a book which was marked "Judgment Docket," the docket fee covers all entries made therein of whatsoever character.

If the appellee had entered in the Criminal Docket the following words, "Defendant convicted, judgment and sentence entered," such entries are evidence of the fact that such proceedings have taken place. But the appellee claims that the entries made by him were not mere memoranda, not contemporaneous entries on the docket, neither are

they "services on trial or argument of the cause" within the meaning of the fee bill.

Again it is claimed by appellant that the "Judgment Docket" so-called, containing entries made in pursuance to the order of the court, supra, is a "docket" within the meaning of that clause of the fee bill providing fees "for keeping dockets, indexes, etc."

The appellee claims that it is not such a docket, that it might more properly be marked and known as a "Judgment Record," but it is immaterial what it is marked or labeled, the fact remains that the entries made by the appellee in the "Judgment Docket" constituted a permanent "record" for the making of which the fee bill provides a fee of fifteen cents per folio.

Respectfully submitted,

FRANK B. CROSTHWAITE,

For Appellee.

Supreme Court of the United States.

No. 482.—October Term, 1906.

The United States, Appellant, vs. Edwin M. Keatley. } Appeal from the Court of Claims.

[February 25, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

The claimant in the court below, appellee here, was clerk of the United States Circuit Court for the Southern District of West Virginia from July 1 to July 6, 1902, and clerk of that court and the District Court from July 16, 1902, to September 17, 1904. He regularly rendered accounts for such services, which contained, among other things, charges for "separate docket fees in separate trials under one indictment." The charges were disallowed and this suit was brought therefor in the Court of Claims. Judgment was rendered for claimant for the sum of $125.45, certain items being disallowed.

A counterclaim was filed by the United States for the recovery of $57.90, charged for "docketing judgments," alleged to have been erroneously and unlawfully paid to claimant by the accounting officers of the United States. The counterclaim was disallowed and the United States assigns as error the action of the court in rendering judgment for the claimant as aforesaid and overruling the counter claim. In passing on the charge for the service the Court of Claims said:

"The defendants' contention as to item 6 is troublesome. It appears that joint indictments were returned against several defendants; that on motion of defendants' counsel separate trials were granted to some of the defendants, whereupon the clerk made separate docket entries in accordance with said motion, docketing said causes as though separate indictments had been returned against the parties granted separate trials.

"Paragraph 10 of section 828 of the Revised Statutes provides:

'For making dockets and indexes, issuing venire, tax costs, and all other services on the trial or argument of a cause where issue is joined and testimony given, three dollars.'

"By paragraph 11 a fee of $2 is allowed where no testimony is given, and by paragraph 12 a fee of $1 is allowed where the cause is dismissed or discontinued or judgment or decree rendered without issue."

The contention of the appellant turns upon the word "cause." The argument is that the word "cause" is limited by the word indictment, and if it be returned against a number of persons and they be granted sepa-

rate trials there is only one "cause." It is conceded that the court may grant separate trials, and it is not disputed that the court did so in the case for which the services sued for were charged and that each was separately designated on the records.

We think the order granting separate trials made separate causes, and therefore each was independent of the other. *State* v. *Rogers*, 6 Baxter (Tenn.) 563; *Noland* v. *State*, 19 Ohio St. 131; *Bryan* v. *Spivey*, 106 N. C. 95. The services rendered were a proper charge under the statute.

2. The counter claim was for the recovery of $57.90, charges made for "docketing judgments," and the lists filed showed amounts from $0.15 to $8.70. The Court of Claims' comment was: "The defendants' counterclaim, predicated upon the alleged illegal allowance for the docketing of judgments, will have to be dismissed. The services here charged for were admittedly performed, by order of the court, and under the Jones case (*supra*) allowable."

The case referred to is *United States* v. *Jones*, 103 U. S. 538. In the absence of anything in the record to the contrary, we must assume that the application of that case was made on account of the facts presented to the Court of Claims in this. Counsel for the United States say that the findings of the Court of Claims "on the subject of the counterclaim are not as full and complete as they might be." A belief is expressed, however, that it appears, from the face of the counterclaim, that they are folio fees. At all events, it is insisted, that they are not the charges specified in paragraphs 10, 11 and 12 of section 828 of the Revised Statutes. This the appellee concedes in effect, and urges that the charge was made under and is justified by paragraph 8 of that section, which reads as follows: "For entering any rule, order, continuance, judgment, decree, or recognizance, or drawing any bond or making any *record*, certificate, return, or report, for each folio fifteen cents." The words we have italicized are the words upon which appellee relies combined with the following order of the court:

"The clerk of this court is directed to keep a judgment docket wherein shall be *recorded* abstracts of all judgments rendered in cases wherein the United States is a party. Said judgment docket shall contain:
"The number of the case.
"The date of the indictment.
"The names of the parties.
"The amount of the judgment.
"The amount of costs.
"The date of the judgment.
"When docketed.
"The amount paid.
"The disposition of the funds and any additional matter which the clerk may deem pertinent."

The record required by that rule, appellee contends, is different from the various dockets which are kept in all United States courts in which brief entries of fact are made, and which, it is said, are covered by the docket fee. The contention is consonant with the decision of the Court of Claims, and we do not think it is refuted by the suggestions made by appellant.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.